

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION



**ADMINISTRATIVE PROCEEDING**  
**File No. 3-15446**

**In the Matter of**

**J.S. OLIVER CAPITAL MANAGEMENT, L.P.,  
and IAN O. MAUSNER,**

**Respondents.**

**Division of Enforcement's Supplemental Brief on the Appointments Clause**

Pursuant to the Commission's October 30, 2015 Order, Securities Act of 1933 Rel. No. 9975, the Division of Enforcement respectfully submits this response brief addressing the constitutionality of the Commission's use of administrative law judges (ALJs) in administrative proceedings. In their supplemental brief, respondents contend that this entire proceeding violates the Appointments Clause of Article II because the ALJ who presided over the hearing below was not properly appointed. *See* U.S. Const. art. II, § 2, cl. 2. But the Commission has repeatedly and unequivocally rejected that argument because the Commission's ALJs are employees, not constitutional officers, and thus are not subject to Article II's requirements. *See Raymond J. Lucia Cos., Inc., et al.*, Exchange Act Rel. No. 75837, 2015 WL 5172953, at \*21 (Sept. 3, 2015); *Timbervest, LLC, et al.*, Investment Advisers Act Rel. No. 4197, 2015 WL 5472520, at \*23-26 (Sept. 17, 2015); *David F. Bandimere*, Securities Act Rel. No. 9972, 2015 WL 6575665, at \*19-21 (Oct. 29, 2015). Respondents provide no persuasive reasons why those decisions should not be followed here.

Respondents offer two main arguments in support of their challenge. Respondents urge that the Supreme Court’s holding in *Freytag v. Commissioner*, 501 U.S. 868 (1991)—that special trial judges of the United States Tax Court were inferior officers—should be extended to Commission ALJs. See Br. 6-9. The Commission has already rejected that argument. See *Lucia*, 2015 WL 5172953, at \*23; *Timbervest*, 2015 WL 5472520, at \*25; *Bandimere*, 2015 WL 6575665, at \*21. Respondents also contend that *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000), was wrongly decided. Br. 10. But the Commission has rejected that argument as well. See *Lucia*, 2015 WL 5172953, at \*21-22; *Timbervest*, 2015 WL 5472520, at \*24; *Bandimere*, 2015 WL 6575665, at \*19-20. Respondents’ brief does not call those decisions into question.

Respondents’ other arguments fare no better. Respondents, for example, contend that “[i]f no party appeals” an ALJ’s initial decision, “the Commission will issue an order that the initial decision has become final, and the action of the administrative law judge shall be deemed the action of the Commission.” Br. 4 (quotation marks, citations, and alterations omitted). But, as the Commission noted in *Lucia*, “[u]nder our rules, no initial decision becomes final simply ‘on the lapse of time’ by operation of law; instead, it is ‘the Commission’s issuance of a finality order’ that makes any such decision effective and final.” *Lucia*, 2015 WL 5172953, at \*22. Moreover, the Commission has the authority, “on its own initiative,” to “review” an initial decision even absent a request by an aggrieved party, 17 C.F.R. § 201.411(c), and has done so on numerous occasions, see *Lucia*, 2015 WL 5172953, at 22 n.107 (collecting cases). The Commission’s choice to exercise that power (or not) in any individual case necessarily requires an examination of the initial decision. It is only after determining that further review proceedings are unnecessary that the Commission issues a finality order. *Lucia*, 2015 WL 5172953, at \*22; see also *Timbervest*, 2015 WL 5472520, at \*24 (“Even where an aggrieved

person fails to file a timely petition for review of an initial decision and we do not order review on our own initiative, our rules provide that ‘*the Commission* will issue an order that the decision has become final,’ and it becomes final only ‘upon issuance of the order’ by the Commission.”) (quoting 17 C.F.R. § 201.360(d)(2)).

Respondents also allege that the government’s brief in *Free Enterprise Fund* took the position that “PCAOB Board members were ‘inferior officers’” even though Board members “lacked final authority to issue decisions on behalf of the Executive Branch.” Br. 11. That case, however, did not address the distinction between employees and inferior officers. It was “undisputed” that Board members were officers. Brief of the United States, *Free Enter. Fund v. Pub. Accounting Oversight Bd.*, 561 U.S. 477 (2010), No. 08-861, at 29 n.8 (Oct. 13, 2009). And the Supreme Court made clear in its decision that adjudicative finality was not at issue in that case because Board members performed “enforcement or policymaking functions” in addition to “adjudicative” functions. 561 U.S. at 507 n.10. Here, by contrast, as the Commission has properly recognized, the Commission ALJs’ lack of authority to issue final

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decisions for the agency is fatal to the claim that the ALJs are inferior officers. *See Lucia*, 2015 WL 5172953, at \*21-22; *Timbervest*, 2015 WL 5472520, at \*24; *Bandimere*, 2015 WL 6575665, at \*19-20. Respondents have offered no reason to revisit that conclusion.

Dated: November 30, 2015

Respectfully submitted,

  
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**In the Matter of J.S. Oliver Capital Management, L.P., et al.**

Administrative Proceeding File No. 3-15446

**Service List**

Pursuant to Commission Rule of Practice 151 (17 C.F.R. § 201.151), I certify that the attached:

**Division of Enforcement's Supplemental Brief on the Appointments Clause**

was served on November 30, 2015 upon the parties below as follows:

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Dated: November 30, 2015

  
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